BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of:

BERKOWITZ FAT CO., DBA
HARRY BERKOWITZ
INDUSTRIES,

Respondent.

Docket No. FMCSA-2007-28143[1]
(Eastern Service Center)

ORDER DENYING PETITION FOR RECONSIDERATION

1. *Background*

This matter comes before the Federal Motor Carrier Safety Administration

(FMCSA) on a Petition for Reconsideration of an Order to Cease All Interstate

Transportation issued by the Field Administrator of the FMCSA's Eastern Service Center

(Claimant).

On September 15, 2006, FMCSA's New Jersey Division Administrator served a

Notice of Claim (NOC) on Berkowitz Fat Co., dba Harry Berkowitz Industries

(Respondent). The NOC charged Respondent with 13 violations of the Federal Motor

Carrier Safety Regulations and proposed a civil penalty of $19,060.[2]

Claimant and Respondent resolved the matters raised in the NOC by entering into

a settlement agreement on October 19, 2006. In this agreement, Respondent agreed to

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[1] The prior case number was NJ-2006-0339-US0853.

[2] Although the NOC was not submitted for the record, it is described in the Settlement
Agreement attached as Exhibit 1 to the Field Administrator's Response and Opposition to
Petition for Reconsideration (Claimant's Response).

pay $16,000 in 10 monthly payments.[3] Paragraph 8 of the settlement agreement provided that the original penalty amount of $19,060 would be reinstated if a payment was not timely received, with the balance of the unpaid penalty amount becoming due immediately. In accordance with 49 CFR 386.22(b), paragraph 8 also provided that the signed agreement is the Final Agency Order in this proceeding.

After Respondent failed to pay the January 2007 installment, Claimant issued an Order to Show Cause on March 14, 2007, demanding payment of the entire balance due and directing Respondent to show cause why it should not be ordered out of service because of non-payment.[4] Respondent failed to respond to the Order to Show Cause and on April 16, 2007, Claimant issued an Order to Cease All Interstate Transportation effective May 2, 2007.[5]

On April 23, 2007, Respondent petitioned for reconsideration of the Order to Cease All Interstate Transportation. Respondent stated that it was "currently in severe financial circumstances" which would eventually be resolved and that it could resume making payments beginning in July 2007. It attached a March 12, 2007, letter from its attorney to the Eastern Service Center, asserting that the January 2007 payment was not transmitted because the person responsible for making the payments had left the company.

In his Response to the Petition for Reconsideration served May 21, 2007, Claimant requested that the petition be denied because the Order to Cease All Interstate

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[3] Exhibit 1 to Claimant's Response, paragraph 7.

[4] Exhibit 2 to Claimant's Response.

[5] Exhibit 3 to Claimant's Response.

Transportation is not a Final Agency Order and there is no provision in the Agency's rules of practice for seeking reconsideration of this order.

2. *Decision*

Claimant is correct. Under 49 CFR 386.22(b), a settlement agreement entered into by the parties to resolve a civil penalty proceeding not before the Agency decisionmaker becomes the Final Agency Order upon execution by the Field Administrator or his/her designee.[6] Under 49 CFR 386.83(a)(2), if a carrier fails to make an installment payment on schedule, the payment plan is void and the entire debt is payable immediately. A carrier that fails to pay the full outstanding balance of the civil penalty within 90 days after the date of the missed installment payment is prohibited from operating in interstate commerce on the 91st day. The prohibition continues until FMCSA receives full payment of the entire penalty. Section 386.83(d) excuses a carrier from making a required installment payment only if the carrier is a debtor in a case under Chapter 11 of the Bankruptcy Code.

Because Respondent did not allege that it is a debtor in bankruptcy under Chapter 11, its severe financial circumstances, however regrettable, may not be considered by the Agency in a petition for reconsideration of an Order to Cease All Interstate Transportation. This order is essentially a mechanism for enforcing the Final Agency

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[6] Although Claimant cites 49 CFR 386.22(a)(3) as legal support for his argument that the settlement agreement was a Final Agency Order, that subparagraph applies only to settlement agreements accepted and approved by the Agency decisionmaker. This case was settled approximately one month after issuance of the NOC and did not come before the Agency decisionmaker. Consequently, there was no formal acceptance and approval of the agreement.

Order (i.e., the settlement agreement) and implementing 49 CFR 386.83(a)(2). It is not

itself a Final Agency Order subject to review under 49 CFR 386.64.

THEREFORE, *It Is Hereby Ordered That* the Petition for Reconsideration by

Berkowitz Fat Co., dba Harry Berkowitz Industries is denied.

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

4/23/09
Date

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of April , 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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